LIBRARY
SUPREME COURT, U.S.

SEP 1 - 1952
CHARLES ELMORE CROPLEY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 205

THE UNITED STATES OF AMERICA,
Petitioner,
vs.
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and the CALIFORNIA ELECTRIC POWER COMPANY.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF IN OPPOSITION FOR PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

EVERETT C. McKEAGE,
BORIS H. LAKUSTA,
514 State Building, San Francisco 2, California,
Counsel for Public Utilities Commission of the State of California.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	4
Argument	5
1. The over-all question is peculiarly narrow	6
2. The case has significance only when related to its peculiar facts	6
3. The California Commission's decision did not depend upon any finding that the sales are in intrastate commerce	7
4. The Government (Navy) has not been harmed by the California Commission's order which is permissive only	8
5. The California Commission's decision, which rests upon a number of principal grounds, any one of which is sufficient to sustain its conclusion, is not inconsistent with existing court decisions	9
a. The Wisconsin-Michigan case	10
b. The Penn Water case	13
6. The California Commission's conclusions under Part I are demonstrably correct. The Government cites no authorities in conflict	16
Conclusion	18

Citations

Cases

	Pages
California Electric Power Co. v. Federal Power Commission, 7th Cir., No. 12987	4
Connecticut Light and Power Co. v. Federal Power Commission, 324 U.S. 515 (1945)	12
Napa Valley Electric Co. v. Railroad Commission, 251 U.S. 366 (1920)	4
Pennsylvania Water and Power Co. v. Federal Power Commission, 343 U.S. 414 (1952)	9, 13, 14
People v. Hadley, 66 Cal. App. 370 (1924)	4
Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927)	12, 15
Safe Harbor Water Power Corp. v. Federal Power Commission, 124 F.2d 800 (3d Cir. 1941), cert. denied, 316 U.S. 663 (1942)	7
Safe Harbor Water Power Corp. v. Federal Power Commission, 179 F.2d 179 (3rd Cir. 1950), cert. denied, 339 U.S. 957 (1951)	7
Southern California Edison Co. v. Railroad Commission, 6 Cal.2d 737 (1936)	4
Wisconsin-Michigan Power Co. v. Federal Power Commission, 197 F.2d 472 (7th Cir. 1952)	9, 10, 12, 13

Statutes

Federal Power Act, 21 Stat. 1063, as amended by Title II of the Public Utilities Act of 1935, 49 Stat. 838, 16 U.S.C. 791, et seq.	3
Part I:	
Sec. 3(4)	3, 10
Sec. 19	2
Sec. 20	2, 17
Part II:	
Sec. 201(a)	3, 10, 16
Sec. 201(b)	3, 10, 16
Sec. 201(d)	3, 10
Sec. 201(f)	3
Public Utilities Act, Cal. Stats. 1951, ch. 764	4

Miscellaneous

S. 2798, 74th Cong., 1st sess.	11
General Order No. 96, Calif. Public Utilities Commission	8

In the Supreme Court
OF THE
United States

October Term, 1952

No. 205

THE UNITED STATES OF AMERICA,
Petitioner,
vs.
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and the CALIFORNIA ELECTRIC POWER COMPANY.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF IN OPPOSITION FOR PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

OPINIONS BELOW.

The decision of the California Public Utilities Commission (R. 6-19) is reported at 50 Cal. P.U.C. 749. The order of the California Supreme Court denying a petition for writ of review is noted in 38 A.C. 323 (R. 68) and its order denying rehearing is noted in 38 A.C. 484 (R. 74). Neither of such orders is accompanied by an opinion.

the effect of the California Commission's construction is to impute to Congress an intent to deny to the Federal Government the federal protection which it has provided for non-governmental purchasers. To put it another way, the Government argues that since the Federal Power Act was enacted to protect the public, therefore, it was enacted to protect somebody else, viz., the Navy, municipalities, and public utility distribution companies in general. Congress would no doubt be amazed to learn that it enacted the Federal Power Act to protect these several intermediate interests.

The legislative history leaves no mistake that Congress was not at all concerned with protecting public utility distribution companies or any other class of intermediate organization, governmental or otherwise, and that the *ultimate consumer* was its only concern. See *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515 (1945). Congress was dealing specifically with the gap revealed in the *Attleboro* case (*Public Utilities Commission v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)), where one utility sells in interstate commerce to another utility for resale, and where the resale price to the consumer is affected by the wholesale price. In the instant proceeding not only is the Navy not a public utility, but it does not engage in anything comparable to public utility service by providing, for its tenants at sufferance, electricity at a nominal charge not designed to return the cost plus a profit.

It is submitted that the broad language lifted out of context by the Government from the *Wisconsin-Michigan* case for the purpose of arguing that *all* sales

for resale, even where the reseller is the Navy and even where the ultimate consumers are only tenants, should not be thus misused to extend to a case having different basic facts. In short, it is submitted that the *Wisconsin-Michigan* case does not constitute a decision contrary, even on principle, to the two grounds in the California Commission decision which the Government contends are affected, viz., (1) the holding that the Navy is not a "person" within the definition of "sale of electric energy to any person for resale" (see Petition, 13 *et seq.*), and (2) the holding that sales to tenants are not sales for resale (see Petition, 18).

The *Wisconsin-Michigan* case is currently the subject of two petitions for writs of certiorari filed in this Court, Nos. 291 and 294, this term.

b. The Penn Water case.

In *Pennsylvania Water and Power Company v. Federal Power Commission*, 343 U.S. 414 (May 26, 1952), this Court dealt with the contention that Penn Water, as a type of "public utility" subject to regulation under Part II, was nevertheless not subject to regulation thereunder because it was a licensee subject to regulation under Part I. This Court rejected the contention, saying (343 U.S. at 418):

> "It would hinder, not help, the Power Act's program if we should impliedly exempt Part I licensees from the more expansive Part II regulation. It may be possible that some future cases will develop minor inconsistencies in the administration of the two Parts. Today's case, however, is not such a one. We hold that Penn Water is subject to regulation under Part

> II of the Act. It is also subject to Part I regulation since the Commission found on substantial evidence, as the court below held, that the States were 'unable to agree' within the meaning of Section 20 of Part I of the Act."

The Government argues that this holding rejects as unsound one of the principal grounds on which the California Commission claimed jurisdiction (Petition, 11, 20). The Government develops its proposition, (1), by seriously misstating the California Commission's ground, (2) by correctly stating that such misstated ground has been rejected in the *Penn Water* case, (3) by going on to attribute a further holding in the *Penn Water* case which a search of that case fails to reveal but which would, indeed, if it could be found, refute the actual ground of the California Commission. Needless to say, the Government's argument on this head is hardly deserving of respect.

Specifically the Government (Petition, 20) declares: "The third ground [of the California Commission], that *an interstate wholesale sale of energy generated at a hydro-electric project licensed under Part I is exempt from regulation under Part II* (R. 15-16), has already been rejected by this Court in *Pennsylvania Water & Power Co. v. Federal Power Commission* . . ." (Emphasis added.) It is true that the *Penn Water* case rejects the ground as stated, but certainly it is not a ground employed by the California Commission. The California Commission was at pains to point out that its conclusion was arrived at independently of whether Part I and Part II of the Act both applied, or Part I only applied or

Part II only applied (R. 12). It was not necessary to decide that issue because, regardless of how it might be decided, Federal Power Commission jurisdiction was found not to exist. Furthermore, the ground which the Government does refer to assumes that both Parts I and II apply.

What the California Commission's actual ground was (R. 15, 16) is spelled out in the following paragraph, and we reiterate that it assumes both Parts I and II of the Act apply, to the extent of making necessary an inquiry whether their provisions grant or deny jurisdiction to the Federal Power Commission.

The California Commission concluded that if there were no federal statute at all, the sales to the Navy could be regulated by the California Commission without violating the interstate commerce clause proscription as revealed in the *Attleboro* decision because, since Nevada could have no jurisdiction over the Navy or the rates it might charge its customers, there would be *no potential clash of state interests* of the kind present in the *Attleboro* case. The California Commission next concluded that even if it were wrong in such interpretation of the interstate commerce clause, if Part I alone of the Act were assumed to exist, the machinery set up by Congress in Section 20 to enable states under certain conditions to exercise jurisdiction without burdening interstate commerce would be available upon the facts shown and make it possible for California to regulate the sales to the Navy. The California Commission next took the situation as it existed, viz., with both Parts I and II enacted by Congress, and concluded that since state jurisdiction

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

The over-all question is whether the California Public Utilities Commission could, consistently with the Federal Power Act, grant to California Electric Power Company permissive authority to charge certain rates in selling electricity to the Navy in California, the Navy taking delivery in California and transmitting the energy over its own lines to Nevada for the use of its Ammunition Depot in that state.

The subsidiary questions are:

(1) Does Part I of the Federal Power Act, giving the Federal Power Commission jurisdiction over sales of electric energy by licensees only in the exceptional circumstances set forth in Sections 19 and 20, give the Federal Power Commission jurisdiction under the particular facts, to the exclusion of the California Commission, where the California Commission is admittedly a qualified commission and where Nevada, whether it has a qualified commission or not, could not in any event regulate the arrangements the Navy makes with its tenants for furnishing electricity because the Navy is an arm of the United States? Section 19 would apply if the sales to the Navy are in *intra*state commerce and local jurisdiction would be conceded. Section 20 would apply if the sales are in *inter*state commerce, and it would then be necessary to make further inquiry to determine (a) whether

both California and Nevada are states "directly concerned," and if so, (b) whether Nevada as well as California has a regulatory commission of the kind contemplated in Section 20, and also if so, (c) whether California and Nevada have been shown unable to agree.

(2) Does Part II of the Federal Power Act, giving the Federal Power Commission jurisdiction over "the sale of electric energy at wholesale in interstate commerce but . . . not . . . any other sale" (Sec. 201(b)), give the Federal Power Commission jurisdiction under the particular facts, to the exclusion of the California Commission, where the purchaser is not a public utility but the United States Navy, and where the energy is purchased solely for use of the Navy's Ammunition Depot in Nevada? The answer depends upon (a) the nature of the sales as being in interstate commerce or not; (b) the definition of "person" in Section 3(4) and the application thereof to the facts in construing Section 201(d) of the Act; (c) the nature of the sales as "wholesale" or not under the definition in Section 201(d) of the Act; (d) the applicability of Section 201(f) exempting the United States from the provisions of Part II; (e) the applicability of Sections 201(a) and 201(b) which preserve state jurisdiction if it existed before.

STATUTE INVOLVED.

The pertinent provisions of the Federal Power Act (21 Stat. 1063, as amended by Title II of the Public Utilities Act of 1935, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*) appear in the pamphlet copy of the Act which it is understood was submitted with the petition.

STATEMENT.

Petitioner's Statement (Petition, pages 5-10) is accurate. A jurisdictional dispute exists between the California Public Utilities Commission and the Federal Power Commission over the regulation of rates for sales of electric energy by California Electric Power Company to the Navy. The California Commission's position has been sustained by the California Supreme Court, whose action in denying a writ of review constitutes a determination upon the merits.[1] The Federal Power Commission's order (reversing the examiner's proposed opinion) has been subjected to review before the United States Court of Appeals for the Ninth Circuit pursuant to Section 313(b) of the Federal Power Act. *California Electric Power Company v. Federal Power Commission*, C.A. 9, No. 12987. Oral argument was had on August 4, 1952. No decision has been rendered to date.

The Federal Power Commission is not a party to the present proceeding. The United States is petitioner, not in the stead of its agency the Federal Power Commission but in the stead of its naval organization, the Navy Department (R. 3). The Navy's position is that the sales to it by California Electric Power Company are subject

---

[1] Public Utilities Code (Cal. Stats. 1951, ch. 764), Section 1757. *Southern Calif. Edison Co. v. Railroad Commission*, 6 Cal. 2d 737, 747 (1936); *People v. Hadley*, 66 Cal. App. 370, 375 (1924). In *Napa Valley Electric Co. v. Railroad Commission*, 251 U.S. 366 (1920), this Court recognized that under the California statute the denial of a writ of review by the California Supreme Court respecting an order of the Public Utilities Commission (formerly Railroad Commission) is "tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the state of California" (251 U.S. at 372).

to Federal Power Commission jurisdiction, not California Commission jurisdiction. The Navy went so far as to adopt, as its points and authorities in seeking California Supreme Court review, the opinion of the Federal Power Commission in the cognate show-cause-proceeding (R. 23, 24), an opinion which for the time being means lower rates to the Navy than those authorized by the California Commission. Such latter circumstance would suggest the motivation for the Navy's position.

Since the energy which California Electric Power Company sells to the Navy is derived in part from federal water power projects of which the company is licensee, and since the energy crosses the state line into Nevada where the Navy as purchaser uses it not only for its industrial operations but for its tenants, both Part I of the Federal Power Act (applying to sales by licensees) and Part II of the Act (applying to sales at wholesale in interstate commerce) are involved in considering the question of jurisdiction.

ARGUMENT.

While admittedly this case raises questions under the Federal Power Act respecting the division between the States and the Federal Government of regulatory jurisdiction over sales of electric energy, it is believed this Court will desire to weigh the following circumstances in determining whether a writ of certiorari should issue:

1. THE OVER-ALL QUESTION IS PECULIARLY NARROW.

The fact that the Navy is the purchaser is a controlling factor in determining the jurisdictional question. Accordingly, whatever the decision, the case can have no general applicability. Nearly all large purchases of electricity for consumption in another state are made by public utility distribution companies, not by the Navy or some other branch of the Federal Government: And even as to the Federal Government the instances must be rare indeed where some branch thereof purchases electric energy in one state, transports it to another, and applies the energy in part to federal industrial activities, while supplying the balance to its tenants. It may even be questioned whether any agency of the Federal Government except the Department of Defense and its divisions could be involved in similar factual circumstances.

---

2. THE CASE HAS SIGNIFICANCE ONLY WHEN RELATED TO ITS PECULIAR FACTS.

Under Part I of the Federal Power Act, state jurisdiction over sales by licensees is vouchsafed even where the sales are in interstate commerce, provided (a) the states "directly concerned" (b) have adequate regulatory bodies and (c) the states have not been shown unable to agree on the rates to be charged. These are largely factual determinations. Accordingly any case involving them can have significance only as limited by those facts. Such circumstance may have had impelling influence in this Court's refusal to issue a writ of certiorari in

the First and Second Safe Harbor cases. The present case seems even stronger for declining review because the determination of which states are "directly concerned" hinges upon the unusual circumstance that the Navy is the purchaser, a department of the Federal Government falling outside the regulatory competence of any state.

Not only under Part I but under Part II the peculiar facts render the case of limited significance. The sales for ultimate consumption are to *tenants of the Navy*, not to the general public. The determination whether such sales are "sales to a person for resale" can have only limited importance beyond the immediate case.

---

3. THE CALIFORNIA COMMISSION'S DECISION DID NOT DEPEND UPON ANY FINDING THAT THE SALES ARE IN INTRASTATE COMMERCE.

It is believed that a strong argument may be made for the proposition that the sales are not in interstate but intrastate commerce since the purchaser which transports the energy across a state line is the Navy, an arm of the Federal Government, not touched by the concept of interstate commerce.[3] However, the California Com-

[2] *Safe Harbor Water Power Corp. v. Federal Power Commission*, 124 F. 2d 800 (3d Cir. 1941), cert. denied, 316 U.S. 663 (1942); *Safe Harbor Water Power Corp. v. Federal Power Commission*, 179 F. 2d 179 (3d Cir. 1950), cert. denied, 339 U.S. 957 (1951).

[3] The Government states (Petition, page 11, Footnote 5) that the authorities leave no doubt that the sales are in interstate commerce. However, none of the cases cited relates to sales of the nature here in issue where the purchaser is the Federal Government.

mission came to its conclusion independently of the interstate commerce question. In construing the Federal Power Act it assumed, for purposes of argument at each juncture in the development of the decision, that interstate sales were involved. Thus there is eliminated any concern which this Court might entertain, at this stage of the proceeding, as to the correctness of any determination below respecting the interstate or intrastate nature of the sales.

4. THE GOVERNMENT (NAVY) HAS NOT BEEN HARMED BY THE CALIFORNIA COMMISSION'S ORDER WHICH IS PERMISSIVE ONLY.

Since the order in question merely authorizes and does not direct California Electric Power Company to charge certain rates in selling to the Navy (R. 19), the company is no precluded from charging any lesser rates since by virtue of the California Commission's General Order No. 96, electric utilities may furnish electric service "at free or reduced rates . . . to the United States and to its departments" (R. 12). The effect of the decision is to place a ceiling but not a floor upon the rates the company may charge. There is nothing in the decision to preclude the company from applying the old 1943 contract rate which the Federal Power Commission in its Opinion No. 212 (R. 24) ordered the company to put in effect pending rate relief under federal regulation (R. 40).

It should be noted that the Court of Appeals for the Ninth Circuit issued an order staying the Federal Power Commission order (R. 72, 73).

It would appear that at most the effect of the California Commission's decision has been to deprive the Navy of some quantum of intangible bargaining power it may have had in negotiating a price for electricity purchased from California Electric Power Company.

---

5. THE CALIFORNIA COMMISSION'S DECISION, WHICH RESTS UPON A NUMBER OF PRINCIPAL GROUNDS, ANY ONE OF WHICH IS SUFFICIENT TO SUSTAIN ITS CONCLUSION, IS NOT INCONSISTENT WITH EXISTING COURT DECISIONS.

The burden of the United States' petition is that the California Commission's decision runs contrary in principle, in so far as certain aspects of the case are concerned, to the ruling of the Seventh Circuit in *Wisconsin-Michigan Power Company v. Federal Power Commission*, 197 F. 2d 472 (7th Cir., June 9, 1952) and contrary, in so far as certain other aspects of the case are concerned, to the decision of this Court in *Pennsylvania Water and Power Co. v. Federal Power Commission*, 343 U.S. 414 (May 26, 1952).

We do not believe that the *Wisconsin-Michigan* case is contrary to any of the grounds in the California Commission's decision, even in principle. As to the *Pennsylvania Water* case we believe that that decision, far from being contrary to the position of the California Commission, in fact supports it.

Below are set forth the reasons why we believe that neither of the decisions referred to affects the correctness of the California Commission's conclusion. It must

be emphasized that any *one* of the principal grounds relied on by the California Commission is sufficient to sustain its position.

a. The Wisconsin-Michigan case.

So far as here pertinent the Seventh Circuit held in *Wisconsin-Michigan Power Company v. Federal Power Commission*, 197 F. 2d 472 (7th Cir., June 9, 1952), petitions for certiorari filed (*Wisconsin-Michigan Power Co. v. Federal Power Commission*, No. 291, Oct. Term, 1952; *Wisconsin v. Federal Power Commission*, No. 294, Oct. Term, 1952), that sales in interstate commerce of electric energy by a public utility to a *municipality* for resale by the latter fall within the purview of the term "sale of electric energy at wholesale" (Section 201(b)), that is, "sale of electric energy to any person for resale" (Section 201(d)), notwithstanding the fact that municipalities are expressly excluded from the definition of "person" in Section 3(4).

The Court recognized that its conclusion was contrary to the literal meaning of the statute (197 F. 2d at 479) but was persuaded by Government counsel to reject the literal meaning as an "oversight," an inadvertent "slip" on the part of Congress.

It would not be appropriate here to unmask in detail the numerous invalid hypotheses which the Government pressed upon the Seventh Circuit and is now pressing upon this Court in urging that Congress did not know what it was doing in defining sales at wholesale. An illustration will suffice. The Government urges that the

House in broadening the definition of "wholesale sale" in the Senate bill (S. 2796, 74th Cong., 1st Sess.) to overcome an obvious loophole in an aspect not here relevant, and in using the phrase "sale of electric energy to any person for resale" to accomplish that result, was concentrating so much upon closing the loophole that it quite forgot that the word "person" was elsewhere specifically defined to exclude municipalities and also to exclude the United States (Petition, 14, 15). The Government urges that if Congress had been more articulate, it would have expressly said that "person" as used in the phrase "sale . . . to any person for resale" meant something else than in the section defining "person." The Court is asked to impute to a word a meaning which is diametrically contrary to the express definition thereof in the same statute. The Court is asked to cast aside the principle of statutory construction that the plain meaning of a statute must be accepted in the absence of manifest error and to substitute in its stead a presumption of careless draftsmanship.

The Government, after discoursing in similar fashion on other aspects of the legislative history, embarks upon an "unreasonable result" argument (Petition, 17) designed to demonstrate that unfortunate consequences would ensue were not municipalities and the Government included by implication in the term "person." In one breath it is stated, quite properly, that Congress established the Federal Power Commission to regulate interstate sales for resale in order to protect the *public* from exploitation by public utilities. In the next breath it is argued, by some transitional process not revealed, that

PAGE

Ohio v. Helvering, 292 U. S. 360 70

Otter Tail Power Co., 2 FPC 134, 137, 33 PUR NS 257, 260 ..... 68, 69

Panhandle Eastern Pipe Line Co. v. Fed. Power Com., 341 U. S. 329 28

Panhandle Eastern Pipe Line Co. v. Pub. Serv. Com., 332 U. S. 507 ..... 27, 81

Pennsylvania Gas. Co. v. Pub. Serv. Com., 252 U. S. 23 ..... 32, 33, 34

Pennsylvania W. & P. Co. v. Fed. Power Com., 193 F. 2d 230 ..... 38, 39, 40, 41

Pennsylvania W. & P. Co. v. Fed. Power Com., 72 S. Ct. 843 ..... 38, 79

Powell v. U. S. Cartridge Co., 339 U. S. 497 62

Publci Utility Com. v. Attleboro S. & E. Co., 373 U. S. 83 ..... 33, 34

Safe Harbor W. P. Corp. v. Fed. Power Com., 124 F. 2d 800 ..... 37, 39, 41, 47

Safe Harbor W. P. Corp. v. Fed. Power Com., 179 F. 2d 179 ..... 38, 39, 41, 52

Trade Mark Cases, 100 U. S. 82 58

United States v. American Trucking Ass'n., 310 U. S. 534 ..... 65, 66, 67, 70

United States v. Cooper Corp., 312 U. S. 600 59

United States v. San Francisco, 310 U. S. 16 31

United States v. South-Eastern Underwriters, 322 U. S. 533 ..... 32, 33, 34

United States v. United Mine Workers, 330 U. S. 258 59

United States v. Wittek, 337 U. S. 346 59

Wabash Co. v. Illinois, 118 U. S. 557 58

Wisconsin-Michigan Power Co., FPC Docket E-6268, June 1, 1951 ..... 28, 68

CONSTITUTION AND STATUTES PAGE

United States Constitution, Art. I, Sec. 8, Clause 1 57
United States Constitution, Art. I, Sec. 8, Clause 3 11
United States Constitution, Art. I, Sec. 8, Clause 13 57
United States Constitution, Art. I, Sec. 10, Clause 3 47
United States Constitution, Art. IV, Sec. 3, Clause 2 ..... 11, 22, 30, 59

Administrative Procedure Act, 5 U.S.C. 1007 8
California Public Utilities Act, Calif. Stat. 1915, p. 115, as amended; Deering's Gen. Laws, Act 6386 ..... 2, 48

Federal Power Act 16 U. S. Code 791 et seq.:
Sec. 3 ..... 63, 67
Sec. 4 69
Sec. 6 25
Sec. 10 25
Sec. 14 26
Sec. 19 ..... 11, 12, 23, 24, 25, 26, 27, 36, 37, 38 39, 40, 43, 48, 49, 52, 53, 54, 85
Sec. 20 ..... 11, 12, 13, 23, 24, 25, 26, 27, 36, 37, 38, 39 40, 41, 43, 46, 47, 48, 49, 50, 51, 52, 53, 54, 85
Sec. 23 67
Sec. 201 ..... 13, 28, 30, 32, 36, 37, 54, 55, 59, 60 63, 65, 67, 68, 69, 70, 71, 72, 77, 81, 84
Sec. 203 28
Sec. 204 28
Sec. 205 ..... 16, 28, 36, 37, 39, 54, 69
Sec. 206 ..... 28, 36, 37, 39, 54
Sec. 202 67
Sec. 303 67
Sec. 304 67
Sec. 305 67

PAGE

Sec. 306 67
Sec. 307 67
Sec. 309 67
Sec. 313 67
Sec. 314 67
Sec. 316 67
Federal Water Power Act, Sec. 320 19
Federal Water Power Act of 1920, 41 Stat. 1063 ..... 18, 19, 23
Forest Service Act, March 4, 1911, 36 Stat. 1244 20
House Hearings on H. R. 5423, February 19, 1935, 74th Cong., 1st Sess., pp. 384-559 72
Insurance Act, March 9, 1945, 59 Stat. 33, 15 U.S.C. 1011-1015 32
Maryland Public Service Commission Law, Sec. 348 49
National Forest Reserves Act, March 3, 1891, 26 Stat. 1095 20
National Forest Reserves Act, March 3, 1891, 26 Stat. 1095, Transfer to Secretary of Agriculture 20
National Forest Reserves Act, February 1, 1905, 33 Stat. 628 20
Natural Gas Act, Sec. 1(b), 15 U.S.C. 717(b) 81
Nevada Public Service Commission Act, Nev. Stat. 1919, p. 198; Nev. Comp. L. 1929, Secs. 6100 et seq 2, 48
Pennsylvania Public Utility Law, Sec. 913(a) 49
Public Utility Act of 1935, 49 Stat. 838 18
Regulations, August 24, 1912, 41 L. D. 150; March 1, 1913, 41 L. D. 532 21
Right of Way Act, February 15, 1901, 31 Stat. 790 19
Right of Way Act, March 4, 1911, 36 Stat. 1253 20
Senate Hearings on S. 1725, April 16-29, 1935, 74th Cong., pp., 223, 224, 232-257 72

IN THE

Supreme Court of the United States

October Term, 1952
No. 205.

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY,

Respondents.

BRIEF FOR RESPONDENT, CALIFORNIA ELECTRIC POWER COMPANY.

Statement of the Case.

The ultimate question involved in this case is whether Federal Power Commission (FPC) or California Public Utilities Commission (California Commission) with or without concurrence of Nevada Public Service Commission (Nevada Commission) has authority to regulate rates charged by Respondent, California Electric Power Company (Power Company or Company), for electric energy delivered and sold at its Mill Creek Plant in Mono County, California, to the United States Navy (Navy) which transmits such energy over its own transmission line for use at Navy's Ammunition Depot, Hawthorne, Nevada.

Subsidiary to the main question, is the question whether, if FPC has jurisdiction over some of such sales, it extends to more than a minor part of such energy which is claimed to be resold.

Company's Electric System.

Power Company renders public utility electric service in Southeastern California in parts of Mono, Inyo, Kern, San Bernardino, Riverside, and Imperial Counties, and, to a much less extent, in Nye and Esmeralda Counties, Nevada [R. 7]. Its system extends in a fairly straight line about 300 miles from Bridgeport, the County Seat of Mono County, California, to San Bernardino, California, from which it widens out into general areas of San Bernardino and Riverside Counties, California, where its largest service areas are located.

Power Company is subject to the jurisdiction of California Commission pursuant to Public Utilities Act of said State (Calif. Stat. 1915, p. 115, as amended; Deering Gen. L., Act 6386).

Power Company is also subject to the jurisdiction of Nevada Public Service Commission by reason of business done in Nye and Esmeralda Counties, Nevada, pursuant to the Public Service Commission of said State (Nev. Stat. 1919, p. 198; Nev. Comp. L. 1929, Secs. 6100 *et seq.*). Said Company is not, however, engaged in business in Mineral County, Nevada, and owns no facilities therein, its service in Nye and Esmeralda Counties being entirely distinct from its sale to Navy at Mill Creek, California, for Navy's use in Mineral County, Nevada.

was allowed prior to the enactment of Part II, whether under the Constitution or by virtue of Part I, Part II by its own terms in Sections 201(a) and 201 (b) operated to deny Federal Power Commission jurisdiction since those sections expressly reserved to the states whatever jurisdiction they possessed prior to the enactment of Part II.

We find nothing in the *Penn Water* case to invalidate the ground of the California Commission as thus stated. It must be remembered that the *Penn Water* case did not involve facts making the *Attleboro* principle inapplicable and did not involve facts showing an absence of disagreement between two states. In short, we submit that the Government's contention that the *Penn Water* case is contrary to a principal ground of the California Commission in construing Sections 201(a) and 201(b) of Part II is unwarranted.

---

6. THE CALIFORNIA COMMISSION'S CONCLUSIONS UNDER PART I ARE DEMONSTRABLY CORRECT. THE GOVERNMENT CITES NO AUTHORITIES IN CONFLICT.

This aspect of the Government's argument for a writ deserves summary disposition.

First it is argued (Petition, 21-23) that the California Commission could not properly conclude that Nevada was a state not "directly concerned" under Section 20. The Government agrees that Nevada has no jurisdiction over the Navy, either as to the rates the Navy pays California Electric Power Company or as to the rates the Navy charges its tenants. It then declares that "intergovern-

Licenses.

Power Company is a licensee [R. 1] under Part I of Federal Power Act (Act) (16 U. S. Code, Secs. 791 *et seq.*), holding licenses for five hydroelectric projects covering nine plants, seven of which are on the Northern Division of Power Company's system and involved in service to Navy as follows:

Mono County, California

	Capacity
Project 1390 Mill Creek Plant	2,500 kw
" 1388 Poole Plant	9,600 "
" 1389 Rush Creek Plant	10,500 "
	22,600 kw

Inyo County, California

Project 1394 Bishop Creek Plant 2	6,000 kw
" " " " " 3	7,200 "
" " " " " 4	6,000 "
" " " " " 5	3,500 "
(Non Project) " " 6	2,100 "
	24,800 kw

From Mill Creek Plant, a 55 kv (kilovolt) line extends to Leevining Substation, into which feeds the Poole Plant on Leevining Creek. From Leevining Substation, a 100 kv tie line known as Northern Division Tie Line extends through and past Rush Creek Plant, thence to the Bishop Creek Plants a distance of some 60 miles.

mental immunity operates with an even hand on both California and Nevada, and, consequently, as far as that Section [20] is concerned, the states' authority to regulate, if they have any, is equal." The Government quite misses the point. California does not claim jurisdiction over the Navy any more than Nevada would. California's basis for jurisdiction is its general regulatory authority over California Electric Power Company. California *is* directly concerned because of that regulatory control. Nevada has no corresponding basis for jurisdiction and is, therefore, not a state "directly concerned."

Next the Government argues that, assuming Nevada is a state "directly concerned," it has not the sort of regulatory commission contemplated by Section 20. The contention is that the Nevada Public Service Commission, to qualify, would have to have (1) extraterritorial powers over utilities operating in other states (Petition, 24), (2) jurisdiction over sales for resale in another state—presumably even where the purchaser is the Navy (Petition, 24), and finally (3) authority to participate in fixing a joint rate with another state (Petition, 25). No authority is cited for the imposition of such requirements and certainly Section 20 was not intended to impose them. The Government in effect argues that a commission to qualify under Section 20 must have powers encroaching upon the sovereignty of a sister state. Such was not the intent of Congress.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
September 15, 1952.

Respectfully submitted,

EVERETT C. MCKEAGE,

BORIS H. LAKUSTA,

Counsel for Public Utilities Commission of the State of California.